

Shivprasad v Gubelman

2022 NY Slip Op 34799(U)

November 30, 2022

Supreme Court, Queens County

Docket Number: Index No. 4119/2018

Judge: Ulysses B. Leverett

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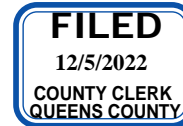
SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF QUEENS

-----X
LEANNIE SHIVPRASAD,
Plaintiff,

Action I
Index No. 4119/2018

-against-

AUSTIN M. GUBELMAN, JOHN W. GUBELMAN,
GLORIA J. LEE, OMAR A. AMAYA, SANDRA E.
DIAZ, CATHERINE A. CHEEK, MASIEL PEREZ
and HECTOR R. PEREZ,
Defendants.



-----X
EKAYLA DIAZ,
Plaintiff,

Action II
Index No. 718462/2018

-against-

JOHN W. GUBELMAN, AUSTIN M. GUBELMAN,
GLORIA J. LEE,
Defendants.

-----X
KARINA LOPEZ
Plaintiff,

Action III
Index No.: 715895/2019

-against-

AUSTIN M. GUBELMAN, JOHN W. GUBELMAN,
GLORIA J. LEE, OMAR A. AMAYA, SANDRA E.
DIAZ, LEANNIE SHIVPRASAD, THAMESHWAR
MANGRA and CATHERINE A. CHEEK,
Defendants.

Motion Seq. No. 5, 6, 7, 8

-----X
Present: HONORABLE ULYSSES B. LEVERET:

Notice of Motion-Affirmation-Exhibits Seq 5.....
Notice of Motion-Affirmation-Exhibits Seq 6.....
Notice of Motion-Affirmation-Exhibits Seq 7.....
Notice of Motion-Affirmation-Exhibits Seq 8.....
Affirmation In Opposition-Exhibits-Seq 5-8.....
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EF-168

Upon the foregoing papers, it is ordered that defendants Austin M. Gubelman and John W. Gubelman's motion (sequence 5); defendant Gloria J. Lee's motion (sequence 6), defendants Omar A. Amaya and Sandra E. Diaz' motion (sequence 8) and defendants Leannie Shivprasad and Thameswar Mangra's motion in Action No. 2 (sequence 7) for an order pursuant to CPLR § 3212 granting defendants summary judgment and dismissing the complaint of plaintiff Karina Lopez on the grounds that she did not incur a "serious injury" as defined under NY Insurance Law §§ 5104 (a) and 5102 (d) is denied. Additionally, defendants Leannie Shivprasad and Thameswar Mangra's motion in Action No. 2 (sequence 7) seeking an order pursuant to CPLR § 3212 granting summary judgment on the issue of liability in their favor and dismissing plaintiff's complaint on the grounds that no material issues of fact exist regarding any negligence on the part of defendants Leannie Shivprasad and Thameswar Mangra for the happening of the subject accident is granted.

This action was brought to recover damages for serious personal injuries allegedly sustained by plaintiff Karina Lopez as a result of a six car motor vehicle automobile accident that occurred on January 23, 2017 on the Meadowbrook State Parkway at or near its exit with Stewart Avenue, County of Nassau, State of New York.

Plaintiff states that at the time of the accident, she was a restrained front seat passenger in a vehicle that was operated by defendant Masiel Perez. Plaintiff states that her vehicle was at a complete stop when it was rear ended by the vehicle owned and operated by defendant Catherine A. Cheek and that her vehicle was hit a second time on the driver's side towards the middle of the car between the front and back doors by the vehicle operated by defendant Omar A. Amaya and owned by defendant Sandra E. Diaz. Plaintiff alleges that as a result of the impacts, she sustained serious injuries to her neck, left shoulder and lower back. Plaintiff states that she did not seek treatment until over a year after the subject accident.

Insurance Law § 5102(d) defines a "serious injury" as " a personal injury which results in death; dismemberment; significant disfigurement; a fracture, loss of a fetus, permanent loss of use of a body organ, member, function or system; permanent consequential limitation of use of a body organ or member; significant limitation of use of a body function or system; or a medically determined injury or impairment of a non-permanent nature which prevents the injured person from performing substantially all of the material acts, which constitute such person's usual and customary daily activities for not less than 90 days during the 180 days immediately following the occurrence of the injury or impairment."

Defendants assert that plaintiff Karina Lopez did not sustain a serious injury as defined in Insurance Law § 5102 (d). In support of the motion, defendant submitted a sworn report dated November 17, 2021 from Dr. Jeffrey Guttman, an orthopedic surgeon who performed an independent orthopedic evaluation on plaintiff on 11/17/2021 and reviewed plaintiff's medical records. Dr. Guttman states that plaintiff's cervical spine range of motion measurements taken with a goniometer revealed flexion to 50 degrees (50 degrees normal), extension to 60 degrees (60 degrees normal), right/left rotation 80 degrees (normal 80 degrees), right/left lateral bending 45 degrees (45 degrees normal). Negative for tenderness or spasm.

The lumbar spine range of motion revealed forward flexion to 70 degrees (90 degrees

normal), extension 20 degrees (25 degrees normal), right/left rotation 20 degrees (25 degrees normal).

Plaintiff's left shoulder range of motion examination revealed forward flexion 170 degrees (180 degrees normal), extension 60 degrees (normal 60 degrees), abduction 160 degrees (180 degrees normal), internal rotation 80 degrees (80 degrees normal), external rotation 80 degrees (90 degrees normal), internal rotation 60 degrees (normal 70 degrees). Negative for swelling or tenderness.

Dr. Guttman diagnosis is cervical and lumbar complaints, unrelated and status post left shoulder arthroscopy. Dr. Guttman states that plaintiff had no treatment for almost 15 months after the subject accident and that the MRIs were taken over a year and a half after the subject accident. Dr. Guttman states that within a medical degree of certainty and based on review of the available medical records and plaintiff's history, plaintiff's complaints and surgery are not causally related to the subject accident and that plaintiff can perform all activities of daily living including work.

Defendants submitted a December 1, 2021 report from Dr. Sheldon P. Feit, a board certified radiologist who performed an independent radiology review of plaintiff's 5/1/2018 lumbar spine MRI which was over fifteen months post accident and plaintiff's 11/8/2018 lumbar spine MRI which was 21 and a half months post accident. Dr. Feit found that both MRIs revealed a normal study and that the lumbar spine demonstrated no discernible abnormalities that are causally related to the subject accident.

Dr. Feit's review of plaintiff's 7/25 2018 left shoulder MRI which was a year and a half after the subject accident revealed no evidence of rotator cuff or fracture. There was a small effusion and mild degenerative change. Dr. Feit states that there are no abnormalities related to the subject accident.

Dr. Feit's review of plaintiff's 5/1/2018 and 11/8/2018 cervical spine MRI revealed pre-existing degenerative change. Evaluation of the sagittal images demonstrates a very small ventral epidural defect at the C5-C6 level. No signal abnormalities are identified within the cervical cord. There is no evidence of spondylolisthesis and no paraspinal soft tissue mass lesions are identified. No post traumatic changes are identified and there are no abnormalities causally related to the subject accident.

The proponent of a summary judgment motion has the initial burden of establishing entitlement to judgment as a matter of law, submitting evidence in admissible form demonstrating the absence of any triable issues of fact (see *Giuffrida v Citibank Corp.*, 100 NY 2d 72 (2003), see also *Alvarez v Prospect Hospital*, 68 NY 2d 320 (1980)). Only when the movant satisfies its prima facie burden will the burden shift to the opponent "to lay bare his or her proof and demonstrate the existence of triable issues of fact" (*Alvarez*, 68 NY 2d at 324; see also *Zuckerman v City of New York*, 49 NY 2d 557 (1980)).

Plaintiff in opposition states that defendants Austin M. Gubelman and John W. Gubelman have not demonstrated that plaintiff Lopez did not sustain a serious injury as defined by Insurance Law § 5102 (d) and that plaintiff has raised triable issues of fact that she did indeed sustain a serious injury. Plaintiff submitted a May 14, 2022 narrative report from Dr. Ajoy K. Sinha, an

orthopedic surgeon who last examined plaintiff on April 30, 2022 and reviewed plaintiff's medical records. Dr. Sinha states that plaintiff underwent left shoulder arthroscopy surgery on 11/12/2018. Plaintiff's left shoulder range of motion examination using a goniometer revealed forward flexion 145 degrees (180 degrees normal), extension 50 degrees (normal 60 degrees), abduction 150 degrees (180 degrees normal), adduction 30 degrees (normal 45), internal rotation 80 degrees (80 degrees normal), external rotation 65 degrees (90 degrees normal), internal rotation 50 degrees (normal 70 degrees).

Dr. Sinha's review of plaintiff's 11/8/2018 lumbar spine MRI revealed inter alia bulging at L2-L3 and L4-L5 resulting in flattening of the dural sac, central disc herniation deforma epidural fat at L5-S1 and progressively increasing bilateral facet changes from L3 through S1, which include traverse narrowing of the canal at L3-L4 and L4-L5.

Dr. Sinha's review of plaintiff's 7/25/2018 left shoulder MRI revealed joint effusion, partial tear of the supraspinatus tendon characterized by marked thickening and increased long TR signal, multiple tiny cysts are seen at the greater tuberosity which may be reactive in nature secondary to supraspinatus tendinitis.

Dr. Sinha's review of plaintiff's 11/8/2018 cervical spine MRI revealed straightening of the cervical lordosis, bulging disc are seen at C3-C4 and C5-C6 resulting on flattening of the dural sac. No evidence of fracture or central spinal canal stenosis.

Dr. Sinha states that based on plaintiff's 4/30/2022 physical examination and within a reasonable degree of medical certainty, plaintiff's left partial rotator cuff tear, shoulder SLAP tear, impingement syndrome, decreased range of motion and pain to the left shoulder are causally related to the subject accident. Dr. Sinha's states that within a reasonable degree of medical certainty, plaintiff has sustained a permanent injury with loss of use, and consequential limitation of her left shoulder as a result of the subject accident.

It is well established that the proponent of summary judgment motion must make a prima facie showing of entitlement to judgment as a matter of law, tendering sufficient evidence to demonstrate the absence of any material issue of fact. See *Zuckerman v City of New York*, 49 NY 2d 557 (1980). Here, the affirmed medical reports of the parties' doctors directly contradict each other. Dr. Sinha states that she disagrees with Dr. Guttman's opinion that plaintiff's injuries to the left shoulder are not causally related to the subject accident as well as Dr Feit's findings that plaintiff's 7/25/2018 left shoulder MRI did not show any evidence of rotator cuff tear and that there are no abnormalities causally related to the subject accident. Where parties offer conflicting medical evidence on the existence of a serious injury, the existence of such injury is a matter for a jury's determination. See *Cracchiolo v Omerza*, 87 AD 3d 674 (2011).

Defendants Leannie Shivprasad and Thameshwar Mangra's motion for summary judgement on the issue of liability (sequence 7) states that at the time of the subject six vehicle chain rear end accident, defendant Shivprasad was driving a vehicle owned by defendant Mangra and was the third vehicle in the multi chain accident. The police report lists the order of the six vehicles involved in the accident, from the front to the back, as follows: first: defendant Perez (host to plaintiff Lopez); second: defendant Cheek; third: defendant Shivprasad; fourth: defendant Amaya; fifth: defendant Lee; sixth: defendant Gubelman. Defendant Shivprasad states that there

were two contacts to her vehicle. The first contact was to the rear of her vehicle but she brought her vehicle to a complete stop without hitting the vehicle in front of her. The second contact to her vehicle occurred when another car came and grazed her driver's side mirror and then hit the rear of the vehicle in front of Shivprasad's vehicle. Defendant Shivprasad states that her vehicle never hit the vehicle in front of her after she was hit by a vehicle behind her and that her vehicle never hit the plaintiff's vehicle. Defendant Shivprasad states that there is no evidence of wrongdoing on her part which either caused or contributed to the accident in any way and submitted depositions of the other defendants in support of her motion.

Defendant Gloria J. Lee and plaintiff Karina Lopez in opposition to co-defendants Shivprasad and Mangra's summary judgment motion on the issue of liability assert that material issues of fact exist as to how the accident occurred, whether or not Shivprasad stopped suddenly and as to the comparative negligence of the movants. Defendants also assert that the motion is premature because discovery is not complete.

A rear-end collision with a stopped or stopping vehicle creates a prima facie case of negligence against the operator of the moving vehicle, thereby requiring that operator to rebut the inference of negligence by providing a non-negligent explanation for the collision. See *Kimyagarov v Nixon Taxi Corp., et al*, 45 A.D. 3d 736, 846 N.Y.S. 2d 309 (2007). If the operator of the moving vehicle cannot come forward with the evidence to rebut the inference of negligence, the occupants and owner of the stationary vehicle are entitled to summary judgment on the issue of liability. See *Piltser v Donna Lee Mgt Corp.*, 29 AD 3d 973, 816 NYS 2d 543 (2006).

Defendants Shivprasad asserts that she was slowing down at the time of the first rear end contact because the vehicle in front of her was slowing down and that her vehicle was at a full stop at the time of the second impact. VTL § 1129 (a) provides that "the driver of a motor vehicle shall not follow another vehicle more closely than is reasonable and prudent, having due regard for the speed of such vehicles and the traffic upon and the condition of the highway". Failure to do so constitutes negligence per se, entitling the party whose vehicle was rear-ended to summary judgment in the absence of an adequate non-negligent explanation. See *Comas-Bourne v City of New York*, 146 AD 3d 855 (2017). Here, defendant Shivprasad asserts that she was rear ended and no non-negligent explanation has been offered that would preclude summary judgment dismissing claims against her. Defendant Shivprasad also has provided un rebutted evidence that she did not rear end the Cheeks vehicle that was in front of her nor did she make contact with plaintiff Lopez' Lopez vehicle.

The Court finds that defendants Shivprasad and Mangra have met their burden of establishing their prima facie entitlement to judgment on the issue of liability. Defendant Lee and plaintiff Lopez have failed to offer any evidence of defendant Shivprasad's negligence or fault for the subject accident. Defendants do not deny that movants' vehicle was rear ended but merely allege that movant may have stopped abruptly before being rear ended. Therefore, defendants Shivprasad and Mangra are granted summary judgment on the issue of liability and dismissal on the grounds that no material issue of fact has been shown regarding movants negligence or liability for the accident or plaintiff Lopez' injury.

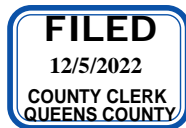
Accordingly, defendants Austin M.Gubelman and John W. Gubelman's motion (sequence 5); defendant Gloria J. Lee's motion (sequence 6), defendants Omar A. Amaya and Sandra E. Diaz' motion (sequence 8) and defendants Leannie Shivprasad and Thameswar Mangra's

motion in Action No. 2 (sequence 7) for an order pursuant to CPLR § 3212 granting defendants summary judgment and dismissing the complaint of plaintiff Karina Lopez on the grounds that she did not incur a "serious injury" as defined under NY Insurance Law §§ 5104 (a) and 5102 (d) is denied. Additionally, defendants Leannie Shivprasad and Thameswar Mangra's motion in Action No. 2 (sequence 7) seeking an order pursuant to CPLR § 3212 granting summary judgment on the issue of liability in their favor and dismissing plaintiff's complaint on the grounds that no material issues of fact exist regarding any negligence on the part of defendants Leannie Shivprasad and Thameswar Mangra for the happening of the subject accident is granted.

This is the decision and order of this Court.

Dated: November 30, 2022


Ulysses B. Leverett, JSC



Hon. Ulysses B. Leverett